



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL PETITION NO. 71 OF 2018**

**BETWEEN**

**DAVID ONGANYI ALELA.....1ST PETITIONER**

**ENOS KALO AKUTE.....2ND PETITIONER**

**MELAZADECK KENGO KHAMATI.....3RD PETITIONER**

**ELIAKIM ELISHE JOHN.....4TH PETITIONER**

**ELPHAS KENGO ONYANGO.....5TH PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. On 7<sup>th</sup> June, 2003, the trial court in **MASENO Criminal Case No.825 OF 2003**, the Petitioners were convicted and sentenced to death for 2 counts of robbery with violence contrary to section 296(2) of the Penal Code. They were also convicted for rape contrary to section 140 of the Penal Code. Petitioners lodged an appeal **Kisumu High Court Criminal Appeal No. 96 OF 2004** which was dismissed on 27<sup>th</sup> March, 2007 whereupon the conviction and sentences were upheld. The petitioners subsequently appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 99 of 2007** and the Court of Appeal similarly upheld his conviction and sentence by a judgment dated 16<sup>th</sup> January, 2009.

2. By a petition filed on 13<sup>th</sup> May, 2019, the petitioners have petitioned this court for resentencing.

3. Ms. Gathu, learned counsel for the state submitted that the petition was not opposed and proposed that the petitioners be sentenced to an imprisonment term of 30 years from date of conviction for the reason that the Petitioners beat and robbed two complainants and gang raped another for over 5 hours.

4. Ms. Obiero for the Petitioners urged the court to consider that they had served 16 years and resentence them to period served.

**Analysis and Determination**

5. At the time of the petitioner's conviction, death was the only available sentence for robbery with violence and imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life for the offence of gang rape.

5. The Supreme Court decision in the case of **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied the **Muruatetu Case (Supra) mutatis mutandis** to the provisions of section 296(2) of the **Penal Code (Chapter 63 of the Laws of Kenya)** which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.

6. In the case of ***Michael Kathewa Laichena & another v Republic [2018] eKLR***, Majanja J, précised the procedure that a court considering resentencing. The court further stated that the **Guidelines** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.

7. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioner could be considered first offenders. The aggravating factors are that the Petitioners not only robbed and injured two of the complainants but also gang raped one for over 5 hours.

8. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The Petitioners have served about 16 years from date of conviction.

9. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In **PETITION NO.67 OF 2018 KEVIN OCHIENG OYUGI vs REPUBLIC** (unreported), I resentenced the appellant to 25 years where the robbery was aggravated serious injuries to the complainant.

10. Although the Petitioners are first offenders, it cannot be overlooked that they committed a heinous crime, and occasioned severe trauma and suffering to the young girl. Their actions are aggravated by gang raping of the complainant which deserves a sentence commensurate to the offences they committed. I have considered that petitioners have already served 16 years, and hence I re-sentence them to an imprisonment term of **30 years** from date of initial conviction.

12. Further to the foregoing, the Petitioners' sentences having been commuted to a definite imprisonment term are also entitled to benefit from remission of sentence **if they meet the conditions**. It is so ordered.

**DATED AND DELIVERED IN KISUMU THIS 30<sup>th</sup> DAY OF May 2019**

**T.W. CHERERE**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant - Felix**

**1st Petitioner - Present**

**2nd Petitioner - Present**

**3rd Petitioner - Present**

**4th Petitioner - Present**

**5th Petitioner - Present**

**For the Petitioners -Ms Obiero**

**For the State - Ms Gatho**